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No. 88-1671

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF LABOR, PETIT

v.

GEORGE R. TRIPLETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY MEMORANDUM FOR THE PETITIONER

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In opposing certiorari, respondent essentially repeats the reasoning of the court below in support of its holding that the black lung attorney's fee provisions, as applied, violate the Due Process Clause of the Fifth Amendment. As we showed in our petition, that reasoning is flawed, and respondent furnishes no new or satisfactory answers to our arguments. Tellingly, respondent never disputes our submission (Pet. 11) that the court decided an important question of federal law warranting this Court's review. Nor does respondent seriously disagree (Pet. 21-24) that the decision below threatens to undermine protection for black lung claimants against overreaching by attorneys—a danger that all agree Congress intended to avoid.*

* Respondent weakly suggests (Br. in Opp. 4) that existing state bar rules are in themselves adequate to protect any interest the government has against overreaching fee agreements, but respondent's exoneration in this very case—in which he threatened the depletion of

Respondent apparently defends the failure of the court below to give proper deference to Congress's regulation of black lung attorney's fees on the ground that the statutory system here was challenged "as applied," not on its face. Br. in Opp. 2-3. That argument, however, ignores this Court's approach in *Mathews* v. *Eldridge,* 424 U.S. 319, 349 (1976)—one of the principal decisions that *Walters* v. *National Association of Radiation Survivors,* 473 U.S. 305, 320 (1985), cited to illustrate the deference required in procedural due process cases. In *Mathews,* as here, the challenge was to statutory procedures "as applied" by the responsible agency. Nevertheless, in rejecting a due process claim that administrators were required to afford an evidentiary hearing before terminating Social Security benefits, the Court stressed that "[i]n assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." 424 U.S. at 349. The same deference should have been accorded here to the good-faith judgments of the Department of Labor, which is charged with the regulation of black lung fees, but the court failed to do so in its haste to free West Virginia attorneys from federal fee regulation.

Respondent also insists at length (Br. in Opp. 4-16) that the court below correctly applied the factors relevant to a procedural due process challenge under *Walters* and *Mathews.* But respondent simply reiterates the same errors as those we identified in the court's opinion: cavalier devaluation of the government's interest in regulating fees (Pet. 13-16); speculation that attorneys are genuinely unavailable under the current fee regime, coupled with an unsupported assertion that the fee system bears responsibility for any attorney shortage (Pet. 16-18); and equation of the disability benefits at issue here with the subsistence welfare benefits found to carry unusually heavy weight in other due process contexts (Pet. 20).

claimants' benefits by entering into contingent fee agreements in direct violation of the statute and regulations—refutes that notion. See also Pet. 23 (discussing past problems with unsupervised black lung fee arrangements).

Respondent next argues (Br. in Opp. 16-17) that the anecdotal record below was sufficient to support the court's condemnation of the federal regulation of attorney's fees in thousands of cases across West Virginia. Perhaps the best refutation of respondent's own point is the fact that he is able to reprint in his forty-five page appendix virtually all of the "evidence" on which the court relied (Br. in Opp. App. A1-A45)—material consisting of a few affidavits sent to the West Virginia Court of Appeals and testimony taken in respondent's disciplinary hearing (where the constitutionality of the fee system was not in issue). That material, added to isolated statements made in congressional hearings, hardly composes a record that can sustain the court's broad holdings about the operation and effect of federal fee regulation on attorneys who represent black lung claimants.

Even that modest record undermines the court's conclusions in ways with which respondent never comes to grips. The Department of Labor's figures showed a 92% representation rate in certain ALJ cases (see Pet. 10), a point that respondent ignores by referring (Br. in Opp. 14) only to the lower success rate of the small fraction of unrepresented claimants. Likewise, respondent never accounts for the impact of the low, but congressionally intended, 5% approval rate for black lung claims on the attractiveness of black lung cases to lawyers (see Pet. 17-18)—even though the attorney affidavits submitted to the court below prominently cite that low approval rate as a key consideration in the reduced attorney interest in black lung cases. See Br. in

Opp. App. A3-A4, A11-A12, A24, A27, A30. And in his complaints about the current fee system (Br. in Opp. 4-5, 15-16), respondent, like the court, overlooks the fact that the hourly component of an attorney's fee award can already take into account the delay in payment, as well as the risk of loss. See Pet. 16 n.5. Cf. *Missouri* v. *Jenkins*, No. 88-64 (June 19, 1989), slip op. 8-9 (recognizing that adjustments in hourly rates can compensate for delay in payment).

Finally, respondent devotes considerable energy to demonstrating a point not in issue here—the complexity of some aspects of black lung cases, and the consequent value of having an attorney. See Br. in Opp. 8-16. Of course, an attorney can be useful in aspects of the black lung claims process; our disagreement with respondent and the court below lies in their unwarranted inferences that an attorney is an essential component of due process at all stages of the black lung claims procedure and that the attorney's fee system is so flawed as to bear the blame for any attorney shortages.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1989

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